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JAMES R. BROWNING, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1959

No. 165

THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Petitioners,

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO PETITIONERS' REPLY

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Dated October 2, 1959.

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REPLY TO PETITIONERS' REPLY

To the Honorable, the Supreme Court of the United States:

The brief filed by petitioners on September 30, 1959, is styled "reply" to respondents' brief in opposition to the petition for a writ of certiorari, but that brief is not a reply to respondents' opposing brief. It is a comment upon, with quotations from, an opinion rendered on June 19, 1959, by the District Court for the Southern District of New York (District Judge Bryan) in *Baltimore & Ohio*

Railroad Company, et al. v. United Railroad Workers Division, etc., 38 Labor Cases 67,717, Paragraph 65,751.

Petitioners neglect to inform the Court that an appeal was taken in the *B&O case;* that such appeal was heard, on briefs and oral arguments, by the Court of Appeals for the Second Circuit on August 21, 1959; and that such Court now has that case under advisement.

The reasoning of the District Court, in the *B&O case,* is obviously unsound and its order restoring the positions, in advance of a decision by the National Railroad Adjustment Board, is an unlawful invasion of the exclusive primary jurisdiction of that Board to determine whether the railroads violated their agreements with the unions. *Order of Railway Conductors v. Pitney, 326 U. S. 561, 90 L. Ed. 318, 66 S. Ct. 322; Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 94 L. Ed. 795, 70 S. Ct. 577; Pennsylvania R. Co. v. Day, 358 U. S. 878, 3 L. Ed. 2d 1422, 79 S. Ct. 124.* Furthermore, in refusing to decide whether the dispute was "major" or "minor" and in relegating that question to the Adjustment Board, *38 Labor Cases 67,723,** the District Court refused to follow the decision of this Court in *Brotherhood of Railroad Trainmen, et al. v. Chicago River & Indiana Railroad Company, et al., 353 U. S. 30, 1 L. Ed. 2d 622, 77 S. Ct. 823,* holding

*Petitioners have not contended that courts cannot determine whether a dispute is "major" or "minor" and that such decision must be made by the Adjustment Board. Furthermore, the District Court and the Court of Appeals, in this case, have held that the disputes are "minor".

that an injunction was properly issued to prevent a strike over "minor" disputes pending before the Adjustment Board. The decision of the District Court, in the *B&O case*, is also contrary to the holding of the Court of Appeals for the Second Circuit in *Herman T. Stichman, Trustee of Hudson and Manhattan Railroad Company v. General Grievance Committee of Brotherhood of Railroad Trainmen, et al., 38 Labor Cases 67,018, Paragraph 65,565* (June 22, 1959), affirming *In Re Hudson & Manhattan Railroad Company, 172 F. Supp. 329*, wherein District Judge Dawson enjoined a threatened strike while a "minor" dispute was pending before the National Railroad Adjustment Board, *172 F. Supp. 332-333*. The case was affirmed, Per Curiam, "on Judge Dawson's lucid and well-reasoned opinion", *38 Labor Cases 67,018, Paragraph 65,565*.

Furthermore, the factual situation in the two cases is different. In the *B&O case*, the District Court stated that the railroads' submission to the National Railroad Adjustment Board "attempts to sustain the burden of showing that the oilers' positions are in fact unnecessary" and that "it is the railroads' position that the question of whether or not the positions are unnecessary is one for determination by the Railway Adjustment Board", *38 Labor Cases 67,719*. No such submission or position has been made or taken by respondents in the instant case. They submitted to the National Railroad Adjustment Board the *claim of petitioners* that respondents violated specific agreements

(R. 166-168; Vol. 2, pages 1-3). This accords with the view of railway labor organizations, as expressed by their spokesman George M. Harrison, that "Grievances are instituted against railroad officers' actions", *Brotherhood of Railroad Trainmen, et al. v. Chicago River & Indiana Railroad Company, et al., 353 U. S. 30, 38, 1 L. Ed. 2d 622, 627-628.*

Petitioners seek a review by this Court on arguments heretofore rejected. *New York Central Railroad Company v. Brotherhood of Railroad Trainmen, et al., 140 F. Supp. 273, affirmed 246 F. 2d 114, certiorari denied, 355 U. S. 877, 2 L. Ed. 2d 107, 78 S. Ct. 140; Norfolk and Portsmouth Belt Line Railroad Company v. Brotherhood of Railroad Trainmen, et al., 248 F. 2d 34, certiorari denied, 355 U. S. 914, 2 L. Ed. 2d 274, 78 S. Ct. 343.**

This Court, in the *Slocum case*, declared that the reasoning of its decision in the *Pitney case* "equally supports a denial of power in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act" *(U. S. page 244, L. Ed. page 800)*. We respectfully submit that this sweeping "denial of power" extends to any judgment or any part thereof, including any condition attached thereto, which invades the jurisdiction of the National Railroad Adjustment Board; that there is no reason, therefore, for this Court again to

*Two of the attorneys in those cases are attorneys of record in this case.

declare the law; and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

/s/ M. E. CLINTON

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/s/ O. O. TOUCHSTONE

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Dated October 2, 1959.

Certificate of Service

I hereby certify that I have this day served copies of the foregoing reply upon counsel for petitioners, by depositing such copies in the United States mail, first-class postage prepaid, and addressed to them as follows: Mr. J. Hart Willis, 1408 Tower Petroleum Building, Dallas 1, Texas; Mr. Wayland K. Sullivan, 1370 Ontario Street, Cleveland 13, Ohio; Mr. Harold C. Heiss, Keith Building, Cleveland 15, Ohio; Mr. Clarence E. Weisell, 1706 Union Commerce Building, Cleveland 14, Ohio; Mr. V. C. Shuttleworth, 1120 Merchants National Bank Building, Cedar Rapids, Iowa; Mr. William P. Fonville, 2232 Republic National Bank Building, Dallas 1, Texas; and Mr. Hart Willis, Jr., 1408 Tower Petroleum Building, Dallas 1, Texas.

I also hereby certify that said copies were forwarded by air mail on this date to all of said counsel for petitioners in Cleveland, Ohio, and Cedar Rapids, Iowa.

Dated October 2, 1959.

/s/ M. E. CLINTON

Of Counsel for Respondents